Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

HOLLY LONG,
Petitioner

Vs.

DAWSON SPRINGS INDEPENDENT SCHOOL DISTRICT, DAVID BOGGS, COMMONWEALTH OF KENTUCKY, and STATE DEPARTMENT OF EDUCATION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Appendices for

PETITION FOR WRIT OF CERTIORARI

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APPENDICES

A – Decision of the Sixth Circuit Court of Appeals

B – Decision on Request for Rehearing by the Sixth Circuit Court of Appeals

C – Decision of the District Court

Statutes

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 05-5535

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

AUG 25 2006

LEONARD GREEN, Clerk

HOLLY LONG, Plaintiff-Appellant v. DAWSON SPRINGS INDEPENDENT SCHOOL DISTRICT, DAVID BOGGS, COMMONWEALTH OF KENTUCKY, & STATE DEPARTMENT OF EDUCATION, Defendants-Appellees.	) ON APPEAL FROM) THE UNITED) STATES DISTRICT) COURT FOR THE) WESTERN DIS-) TRICT OF) KENTUCKY

Before: BOGGS, Chief Judge; SUTTON, Circuit Judge; and HOOD, District Judge.

PER CURIAM. Plaintiff Holly Long, who as a student in the mid-1990s was denied adequate special educational services by the Dawson Springs School District, appeals the district court's dismissal with prejudice of her claims, under 42 U.S.C. Section 1983 and the Individuals with Disabilities Act (IDEA), 20 U.S. C. Section 1400 *et seq*. We affirm the ruling of the district court.

1 The Honorable Denise Page Hood, United States District Judge for the Eastern District of Michigan

Plaintiff Holly Long is learning impaired. It is agreed by all parties that she qualifies as a special education student under the IDEA. She enrolled in January 1992, in the Dawson Springs School system in Hopkins County, Kentucky. She was fourteen. Her family became dissatisfied with her education. On September 29, 1994, they sought a due process hearing pursuant to 20 U.S.C. Section 1415(f), as implemented in 707 KAR 1:340, Sections 5-8, on the theory that Dawson Springs was not in compliance with its requirements under the IDEA. Long's family claimed, *inter alia*, that the school district had not implemented her individualized education program ("IEP"). The Department of Education appointed a hearing officer and scheduled a hearing for November 15, 1994. The Long family requested that the hearing be cancelled. The Department then dismissed the due process proceeding, and the Longs never asked that it be reopened.

Holly Long withdrew from the Dawson Springs Schools on December 7, 1994. Her family moved to Oldham County, where she enrolled in the public schools. She finished her twelfth year of education in 1998.

Her family filed a complaint on May 27, 1998, under the Department of Education's complaint resolution procedures authorized in Kentucky by KAR 1:340 Section 15 (the complaint resolution procedure, of "CRP"). The CRP is an alternative approach to a due process hearing. The Long family's complaint sought further educational services for Holly Long. It alleged that Dawson springs failed to implement her IEP between August 1991 and December 1994. The Department investigated and issued eight findings on September 2, 1998. Those findings were, in summary:

1) Dawson Springs did approve policies for the implementation of Holly Long's IEP. But it did not implement the IEP in timely fashion. "Therefore, Dawson Springs failed to provide a free and appropriate education to Plaintiff."

2) The school districct had placed Holly Long in the "least restricted environment . . . and offered placement alternatives to the parent."
3) The school district "did not provide post-secondary transition planning for Plaintiff."
4) The school district "did not implement a system to monitor, collect and report progress data for any of the short-term instructional objectives set out in the IEP's from 1991 through 1994." Nor did it "ensure implementation of any IEP's as written during that period."
5) Dawson Springs did furnish a computer and printer for use by Holly Long at school, "evaluated [her]for assistive technology devices[,] and offered to provide the recommended assistive technology."
6) The school district "failed to provide a comprehensive framework or multi-year course of study, failed to determine whether Plaintiff was eligible for a diploma or certificate of completion, and failed to provide a graduation plan."
7) "Dawson Springs did not make an extended year program available and did not determine whether Plaintiff needed extended school year services."
8) "Plaintiff is entitled to compensatory services for the time she was denied a FAPE [free and appropriate public education}, which was approximately three years. Dawson Springs was required to convene an ARC meeting" [Admissions and Release Committee, discussed in 707 KAR 1:280]," which is charged with "developing, reviewing, or revising an additional education program (IEP) for a child with a disability." The school district was obligated to convene the ARC "as soon as it can be conveniently arranged, to discuss compensatory services for the time period Plaintiff was denied FAPE. Dawson Springs was required to submit documentation of this ARC meeting to the Division of

Exceptional Children Services within ten days of the meeting."

Long did not appeal or seek review of the Department's conclusions, though she had the option to seek further review from the United States Department of Education under 34 C.F.R. Section 300.661(d) (repealed in 1999). However, Dawson Springs does appear to have sought reconsideration of the Kentucky Department's findings. It is unclear what procedural basis the school district relied upon for this petition for reconsideration, but the further review did take place. The Department of Education issued a further opinion on the matter more than a year after its first one. The Department affirmed seven of the eight findings on September 28, 1999. However, with respect to number six, the Department wrote:

"The September 2, 1998, report of findings determined the student was not provided FAPE during the period investigated. Therefore, the student is entitled to compensation for educational services not provided. The corrective action plan ("CAP") requires the district to convene an ARC meeting with the student to determine how, when, where and in what form the services will be provided. The district must submit to this office copies of the ARC meeting invitations as well as conference summary reports which describe the results of an ARC meetings held with the emancipated student by November 30, 1999."

In other words, the Department ordered that further documentation be provided before it could reach any ultimate conclusion on at least this portion of its decision.

Following the order of September, 1999, Dawson Springs scheduled an ARC meeting. The Long family requested that a Department representative attend. The family asked also that the meeting be held in Frankfurt. The Department declined to send a representative, noting it had no role to play in the ARC. The Long family expressed and exhibited unwillingness to meet with the

school district's officials in the absence of a Departmental representative, the Longs and the school district entered into a relatively involved correspondence. In the course of that correspondence, Dawson Springs agreed to pay for two months of evaluative services by an organization called Career Services, Inc., which appears to be a general purpose employment opportunity entity. One of the services it provides is training assistance (chiefly employment training, apparently) to persons with special educational needs. The Long family indicated a desire to work with Career Services, and Dawson Springs offered to pay for two months of the company's time.

Dawson Springs sent Career Services a series of inquiries seeking information about Holly Long's education needs. After some delays, Career Visions answered the school district questions, but it is unclear whether Career Visions transmitted a full and satisfactory version of its answers to the school district. The reason for this confusion is that, as noted infra, a later meeting between the parties produced a set of terms, including the condition that Career Visions furnish the school district with answers to all of its questions. Dawson Springs scheduled and ARC. However, it appears that Dawson Springs had trouble reaching the Long family by telephone. This caused further delay. Then Holly Long's attorney resigned from the case. More delay ensued. David Boggs, Superintendent of the school district, sent a letter directly to the Long family on July 13, 2000, proposing settlement terms:

"Compensatory education through a written contract for computer education training with a company like Career Visions for up to a maximum of 104 weeks beginning July 1, 2000, consisting of two sessions for one and a half hours per session at a maximum of $75 per hour for training, $30 per hour for travel time and 31 cents per mile for travel to sessions."

Long's new lawyer declined these terms. The lawyer emphasized that the Department's findings obligated the school district to furnish education for the same amount of time a FAPE had been withheld. The parties disagreed, at this moment and

throughout the litigation, on the length and nature of education time owed Long. Long enrolled in the school district on January 28, 1992. She departed December 7, 1994. After vacation time is deducted, that translates to roughly 100 weeks of school time, which comports with Dawson Spring's calculation that it owes 104 weeks of school time. By contrast, Long asserted that she was owed three and a half years of education.

The school district then scheduled another ARC. Both parties appeared at this ARC on September 20, 2000. They agreed that: 1) Career Visions would furnish Dawson Springs with complete answers to its questions, and 2) the school district would provide Long with the use of a computer. However, they continued to disagree as to the amount of education time the district owed Long.

Through counsel, the Long family wrote to the Department of Education on November 30, 2000, complaining about delays and the school district's offer. The Department reviewed the most recent proceedings and concluded that Dawson Springs, by and through holding the ARC meetings and making its offer to the Long family, had discharged its obligations under the departmental order of September 2, 1998. The Department's letter then noted that the Long parents could seek further recourse by following the complaint resolution or due process hearing procedures provided by 707 KAR 1:340, Sections 5-8 and 34 C.F.R. Part 300.506-10. The letter concluded "[a}s you are aware, these procedures have to be exhausted prior to filing any type of civil action."

Long's lawyer replied by arguing that it was the Department's responsibility to take corrective steps in the case. In response, the Department issued a letter on February 8, 2001, stating that it considered the matter closed and informing the Long family again that it could seek a due process hearing.

The Long family and Dawson Springs met again on May 22, 2001, to discuss settlement terms. They did not reach an agreement.

Long filed suit giving rise to our case on June 28, 2001. The next week, Dawson Springs asked Career Visions to provide services to Long under the terms of the November 17, 2000 ARC

action plan. Career Visions replied by informing the school district that the Longs had declined to accept the services at that time.

The school district moved on September 14, 2001, to dismiss the complaint. The Department entered a similar motion on February 11, 2002.

The district court examined the case and determined that ill will between the parties had gotten in the way of successful resolution that would actually assist in the plaintiff's education. The court held a telephonic conference among the parties on May 21, 2002. On that call, the parties agreed to circulate the names of three professionals who would evaluate Holly Long. Observing the parties' good faith efforts, the district court denied without prejudice the parties' pending dispositive motion on July 26, 2002.

The parties eventually agreed that a professional named De. Deborah Bauder would be selected to recommend a program of services tailored to Long's needs. However, when Bauder sought to examine Long, her lawyer objected, stating that there was no need for further evaluation of the plaintiff. On May 9, 2003, the court held a further conference. The parties finally agreed on a program of services and assessments that would last up to three years. The court issued an order reflecting that agreement on May 20, 2003. At oral argument, it was agreed that three years of services had been furnished to Holly by May 2006.

Thereafter, Dawson Springs reimbursed Career Visions and related professionals who furnished the services to Holly Long. After some time, the court reviewed the services provided by Career Visions, as well as their progress report on the plaintiff. In an order of June 29, 2004, the court concluded that the delivery of the services was satisfactory and that the "promise of continuing those services could resolve all the disputes at issue."

Around this time, Career Visions suggested that Long's educational services be expanded to eight hours per week. The court adopted this recommendation on August 10, 2004. The court also asked the parties to resubmit their dispositive motions it had earlier denied. They did so.

On December 20, 2004, the court issued a memorandum opinion and order on the dispositive motions. The court considered

Long's claim under the IDEA. The court noted that the plaintiff complained of two things: 1) the delay in providing her with compensatory education between September 28, 1999, and June 1, 2003 (the period between the Department's order following reconsideration and the district court's final order on furnishing the services), for which they sought compensatory money damages under the IDEA; and 2) the denial of her education between 1992 and 1994, for which they did not seek money damages. The court ruled temporarily that Long had no legal basis for her claim for monetary damages. It ruled further that there was no federal jurisdiction to hear Long's apparent appeal from the Department of Education's disposition in the CRP, because Long had never exhausted her administrative remedies under IDEA's provision for a due process hearing, which was the only administrative procedure for the assertion of federal jurisdiction under all relevant statutes and regulations. The court dismissed Long's IDEA and Section 1983 claims with prejudice. The district court also ruled that, "so long as Dawson Springs continues to pay for the current level of education services provided by Career Visions (including transportation), it is in compliance with the Department of Education's final order dated September 28, 1999." This portion of the district court's opinion may be viewed as both an expression of good will and gratuitous, as the court correctly disposed of the case on the grounds of exhaustion.

On February 4, 2005, the court made these orders final. They are now appealed.

II

The IDEA requires that school districts receiving federal funding provide a "free and appropriate public education"("FAPE" to all special education students. 20 U.S.C. Section 1412; Bd. of Ed. of Hendrick Hudson Central Sch. Dist., Westchester Cty., v. Rowley, 458 U.S. 176, 179 (1982). The IDEA establishes procedures by which school officials, parents, and the student can collaborate to create an IEP. 20 U.S.C. Section 1401(11), 1414(d); Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359, 368 (1985). The IDEA also provides for administrative procedures to resolve disputes when the people

involved in the creation of an IEP are notable to agree on its substance. 20 U.S.C. Section 14125(b).

It is clear that the IDEA authorizes the award of funds to parents to reimburse them for expenses on special education that a school board should have, but did not, provide. Town of Burlington, 471 U.S. at 369-70. However, in Town of Burlington, the Supreme Court appeared to suggest that money awards under the IDEA should not be made as "damages." Our court read this case as holding that money damages are not available as a remedy for violations of IDEA. Crocker v. Tennessee Secondary school Athletic Ass'n, 980 F.2d 382, 386 (6th Cir. 1992) Throughout this litigation, Long has criticized the Crocker decision in this particular. The Crocker holding is consistent with the view of other circuits on this question, however. See Mata Diaz-Fonseca v. Commonwealth of Puerto Rico, 451 F.3d 13 (1st Cir. 2006); Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 124 (1st Cir. 2003); Polera v. Bd. of Educ., 288 F.3d 478, 485-86 (2d Cir. 2002); Sellers v. Sch. Bd. of Manassas, Va., 141 F.3d 524, 527 (4th Cir. 1998); Charlie F. v. Bd. of Educ., of Skokie Sch. Dist., 98 F.3d 989 (7th Cir. 1996); Heidemann v. Rother, 84 F.3d 1021, 1023 (8th Cir. 1996); Witte v. Clark Cty. Sch. Dist., 197 F/3d 1271, 1275 (9th Cir. 1999). In any event, our panel is bound by the decision of the Crocker panel. United States v. Yoon, 398 F.3d 802, 806 (6th Cir. 2005). No monetary damages may be awarded to the plaintiff in this case under the IDEA.

Long also seeks money damages under 42 U.S.C. Section 1983. In Gean v. Hattaway, 330 F.3d 758 (6th Cir. 2003), we affirmed the view taken in Covington v. Knox County Sch.Sys., 205 F.3d 912 (6th Cir. 2000) that IDEA claims "may be brought either directly under the IDEA's own provisions for dispute resolution, or, in some circumstances, under 42 U.S.C. Section 1983." However, it appears that our court has not allowed plaintiffs to seek monetary damages for violations of the IDEA under Section 1983. That is appropriate, as Section 1983 doe not permit us to recognize rights that are not specifically provided for in federal law. See, e.g., Gardenhire v. Schubert, 205 F.3d 303 (6th Cir. 2000). The existence of express remedies in a statutory scheme demonstrates

that Congress intended to supplant other remedies that might otherwise be available to complainants. Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 14-15 (1981); see also city of Rancho Palso Verdes v. Abrams, 544 U.S. 113, 120; Blessing v. Freestone, 520 U.S. 329, 342 (1997).

Long seeks in this litigation to have the Department's final 1999 administrative order enforced by the federal courts. The state has argued that the governing statutory framework does not provide for such enforcement. The state has argued that the governing statutory framework does not provide for such enforcement. The state argues further that, before the federal courts could provide such a remedy, Long must first exhaust her administrative remedies.

The IDEA provides for two administrative procedures. The first is called the due process hearing. 20 U.S.C. Section 1415(f), codified in 34 C.F.R. Sections 300.506-300.515, implemented in the State of Kentucky as 707 KAR 1:340Section 2-8 (West 2004). As noted supra. Long initiated her due process procedure against the school district in 1994. She also abandoned it almost immediately.

The second approach is the complaint resolution procedure, or CRP, authorized in 20 U.S.C. Section 1221e-3, which provides for promulgation of the Education Department General Administrative Regulations ("EDGAR"). The regulations, which comprehend the CRP, were codified as 34 C.F.R. Sections 300.660-300.662 and implemented in the State of Kentucky as 707 KAR 1:340 Section 15 (West 2004). In 1999, Long began a CRP. Our case is a lawsuit seeking relief from the remedy furnished in that CRP.

The due process hearing procedure contains certain safeguards not evident in the CRP. For example, Section 1415(i)(e)(A) expressly authorizes an appeal in federal court. The state regulations that implement the hearing procedure reiterate this authorization. 707 KAR 1:340 Section 8(2). There is no comparable federal or state statutory or implementing regulatory language that authorizes federal review of the outcome of the CRP procedure. Kentucky's CRP administrative regulations do refer to

an appeal to the Commissioner of the Department of Education, but no more. 707 KAR1:340 Section 15(4).

The district court concluded "an appeal of the CRP final decision is unavailable here." The court made several further trenchant observations:

"Labeling this complaint an appeal from the CRP decision probably confuses already difficult issues. The Department's most important conclusions were that Dawson Springs had failed to provide a FAPE and that Plaintiff was entitled to compensatory services for an equal time period. Its order neither specified nor ordered specific compensatory services. It left that job to ARC meetings between the school district and the parents. Tellingly, Plaintiff has never expressed disagreement with any part of the Department's final order. Thus, it is not surprising that she never initiated an administrative appeal from any part of the Department's administrative findings or order."

In a footnote to this portion of its Memorandum Opinion, the district court recalled that"[b]oth the Department and this Court have determined that Dawson Springs has complied with [the Department's order]."

In an effort to disentangle the various components of the case, the district court contemplated the possibility that the "Longs' real aim may be to challenge the sufficiency of their daughter's current educational services." If this were the case, the district court wrote, the record available to it-and to our court-would not be sufficient for federal review. The plainti9ff would first have to exhaust all available administrative remedies under the IDEA, including the due process hearing approach. This is correct. After all, the IDEA gives the "primary responsibility...for choosing the educational method most suitable to the child's needs...to state and local educational agencies in cooperation with the parents or guardian of the child." Hendrick Hudson, 458 U.S. at 207. The federal courts are not the entities best equipped to craft an IEP or remedial substitutes. They are, instead, suited to reviewing detailed administrative records, such as those that would be furnished through due process hearings (the statutory provision for which also provides for federal appeal therefrom) under the IDEA. As the

district court noted, "Plaintiff has not pursued her due process remedies either with respect to the 1992-1994 or the 1999-2003 time periods."

It is lamentable that, twelve years after the Long family first sought a due process hearing, which they subsequently abandoned, the parties remain in such an apparently intractably adversarial posture. Holly has received educational services that might be said to discharge the school district's obligations under the Departmental order. But it can only be speculated what she would have received had the Long family not abandoned the federally appealable administrative procedure.

Long also claims violations under Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(d); Title IX of the Educational Amendments of 1972; Section 504 of the Rehabilitation Act of 1973; and Title II of the American with Disabilities Act of 1990. In 1985, Congress amended the IDEA to include a provision stating that 'before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required if the action has been brought under this subchapter." 20 C.F.R. Section 1415(1); see also Pub.L. No. 99-372, 100 Stat. 796 (1986); S. Rep. No. 99-112 at 2 (1985), reprinted in 1986 U.S.C.C.A.N. 1798, 1799. Subsection (f) provides for the due process hearing under the IDEA.

The exhaustion requirement applies to this case. Out court has nto yet made this requirement explicit for all cases that involve IDEA claims, but our sister circuits have done so, especially where the plaintiff's claims related directly to his or her access to a FAPE. See, e.g., Frazier v. Fairhaven Sch. Dist., 276 F.3d 52 (1st Cir. 2002); Polera, 288 F.3d 478; Robb v. Bethel Sch. Dist.#403, 308 F.3d 1047 (9th Cir. 2002); Cudjoe v. Ind. Sch. Dist No. 12, 297 F.3d 1058 (10th Cir.); Babicz v. School Board of Broward County, 98 F.3d 989 (7th Cir. 1996). Based on the plain language of the IDEA amendment, which itself is sufficient, and upon the interpretation of this amendment by our sister circuits as it applies to a case such as ours, we conclude that Long must first exhaust her administrative procedure before suing in federal court.

III

We affirm the district court's judgment dismissing this action for lack of exhaustion. The parties agreed at oral argument that the Long family may still seek a due process hearing, pursuant to 707 KAR 1:340 Section 5.

APPENDIX B

No. 05-5535

FILED
NOV 13 2006
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HOLLY LONG,

Plaintiff-Appellant

v.

DAWSON SPRINGS INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants-Appellees

ORDER

BEFORE: BOGGS, Chief Judge; SUTTON, Circuit Judge; and

HOOD, District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

SIGNED, Leonard Green

Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:01CV-389-H

HOLLY LONG PLAINTIFF

V.

DAWSON SPRINGS INDEPENDENT
SCHOOL DISTRICT, et al.

MEMORANDUM OPINION

Plaintiff, Holly Long, attended school in the Dawson Springs Independent School district ("Dawson springs") between January, 1992, and December, 1994. The Long family believes that during that time Dawson Springs completely failed its responsibility to provide appropriate educational services to address their daughter's learning impairments. In 1999 the Kentucky Department of Education (the "Department") ruled in their favor. The Longs allege that between 1999 and 2003 Dawson Springs again failed to provide appropriate compensatory educational services. Holly Long is now twenty-seven years old and still needs specialized training.

Plaintiff asserts causes of action under the Individuals with Disabilities Education Act ("IDEA"), Title VI of the Civil Rights Act of 1964, Title IX of the Educational Amendments of 1972, section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990 and the Freedom of Information Act ("FIOA"). The dispute now focuses on the remedies available under these statutes and, particularly, whether any legal theory can support a claim for compensatory damages arising from these lengthy and complicated series of events.

The Court concludes the compensatory money damages are unavailable under any of the theories alleged. Plaintiff doe have a claim for appropriate educational services. The proper method of asserting such a claim, however, is not by an original action in federal court.

I.

It is important to set out the entire context of events beginning with those occurring over a decade ago. Holly Long began her schooling in the Fayette County schools. She was classified as a special education student under the IDEA. Her real difficulties began after leaving Fayette County.

On January 28, 1992, at the age of fourteen, Holly Long enrolled in the Dawson Springs Schools in Hopkins County, Kentucky. All concerned recognized that she was entitled to a free and appropriate public education ("FAPE"). After a period of time, the Long family became dissatisfied with their daughter's education, believing that Dawson Springs was not complying with the IDEA. Consequently, on September 29, 1994, Plaintiff requested such a hearing as provided by 20 U.S.C. Section 1415(f) and as implemented in 707 KAR 1:340, Sections 5-8 (the "due process" hearing) contending that Dawson Springs had failed to implement Plaintiff's individual education program ("IEP") and that her educational placement was inappropriate. Pursuant to Kentucky's regulations, the Department appointed a hearing officer and scheduled a hearing for November 15, 1994. Shortly thereafter, the Long family requested that the hearing be cancelled. The Department dismissed the due process proceeding, and the Long family never requested that it be reopened.

On December 7, 1994, Holly withdrew from the Dawson Springs schools. She subsequently enrolled in the Oldham County School District where the family apparently moved. For the next four years Plaintiff attended Oldham Sounty Schools. In the spring of 1998, Plaintiff completed her twelfth year of formal secondary education and her final year in the Oldham County schools. This led directly to the events that are the central focus of this case.

A.

On May 27, 1998, Plaintiff filed a complaint under the Department's complaint resolution procedures as implemented in 707 KAR 1:340 Section 15 (the "CRP"). The complaint alleged that Dawson Springs had failed to fully implement Holly's IEP's during the time between August, 1991, and December, 1994. The Longs' purpose was to obtain additional educational services for their daughter. Pursuant to its regulations, the Department

investigated the matter and on September 2, 1998, issued eight sets of findings of fact and conclusions. In summary, those findings of fact and conclusions stated:

> "1. Dawson Springs had approved policies and procedures in place for ensuring the implementation of full educational opportunities for Plaintiff. However, it failed to implement the transferred IEP in a timely manner, failed to provide post-secondary transition planning and failed to implement the IEP's as written. Therefore, Dawson Springs failed to provide a free and appropriate education to Plaintiff.
>
> 2. Dawson Springs provided placement in the least restricted environment on a regular basis and offered placement alternatives to the parent, provided a continuing replacement alternatives and offered placement in a least restrictive environment.
>
> 3. Dawson Springs did not provide post-secondary transition planning for Plaintiff. Even though the parents may not have attended meetings and may not have cooperated with planning, that did not relieve Dawson Springs of its obligation under this requirement.
>
> 4. Dawson Springs did not implement a system to monitor, collect and report progress data for any of the short-term instructional objectives set out in the IEP's from 1991 through 1994. Dawson Springs did not ensure implementation of any CRP IEP's as written during that period.
>
> 5. Dawson Springs provided a computer and printer for Plaintiff's use at school, evaluated the student for assistive technology devices and offered to provide the recommended assistive technology.
>
> 6. Dawson Springs failed to provide a comprehensive framework or multi-year course of study, failed to determine whether Plaintiff was eligible for a diploma or certificate of completion, and failed to provide a graduation plan.
>
> 7. Dawson Springs did not make an extended year program available and did not determine whether Plaintiff needed extended school year services.

> 8. Plaintiff is entitled to compensatory services for the time she was denied a FAPE, which was approximately three years. Dawson Springs was required to convene an ARC (Fn. 1) meeting as soon as it can be conveniently arranged, to discuss compensatory services for the time period Plaintiff was denied FAPE. Dawson Springs was required to submit documentation of this ARC meeting of the Division of Exceptional Children Services within ten days of the meeting.

At the conclusion of the written decision, the Department advised Plaintiff pursuant to 34 DC.F.R. 300.661(d) (repealed 1999), that she could appeal the decision to the United States Department of Education. (Fn. 2) Plaintiff did not pursue an appeal or review of the Department's findings.

Dawson Springs did seek a reconsideration of the Department's findings. (Fn. 3) For inexplicable reasons, the Department took over a year later to do so and to issue a final decision. Eventually, on September 28, 1999, the Department affirmed the Department's earlier findings in all respects, except as to finding number 6. The final decision concluded by stating that:

> "The September 2, 2998, report of findings determined the student was not provided FAPE during the period investigated. Therefore, the student is entitled to compensation for educational services not provided. The corrective action ("CAP") requires the district to convene an ARC meeting with the student to determine how, when, where and in what form the services will be provided. The district must submit to this office copies of the ARC meeting invitations as well as conference summary reports which describe the results of any ARC meetings held with the emancipated student by November 30, 1999.

In sum, the Department concluded that Dawson Springs had failed to provide a FAPE for Holly Long from 1992 through 1994;

and required it to provide additional compensatory educational services "for the time period Plaintiff was denied a FAPE." The Department did not specify the services required. (Fn. 4) Instead, the Department ordered Dawson springs to convene an ARC meeting to determine "how, when, where and in what form" it should provide needed educational services. Such an order is consistent with the IDEA's statutory scheme, that parents, teachers and education specialists make the first efforts to reach agreements on an individual educational plan.

B.

The next sequence of events concerns the parties' interactions over the next twenty months as each attempted to fulfill the Department's final decision.

Soon after receiving the final order, Dawson Springs scheduled an ARC meeting as the CRP decision required. The Long family asked that the meeting occur in Frankfort and that a Department representative attend. The Department said that it had no role in the ARC and declined to send a representative. The Long were reluctant to meet alone with Dawson Springs. As a consequence of these differences, several months of discussions. followed. Dawson Springs agreed to pay for two months of evaluation services by Career Visions. As a part of this process, Dawson Springs forwarded a questionnaire to Career Visions to elicit information about Plaintiff's needs and abilities in an educational setting.

More delays followed; the Long family distrusted school district officials; Dawsnon springs refused to commit to any particular services without a new assessment of Holly Long's needs, Finally, Career Visions completed this evaluation and Dawson Springs scheduled another ARC. More delays occurred when Dawson Springs had difficulty contacting the Longs by phone and then the Longs' attorney resigned from the case. Consequently, Dawson Springs Superintendent David Boggs communicated directly with the Longs by letter dated July 13, 2000. As a full settlement of its obligations, Dawson Springs proposed to provide:

> "Compensatory education through written contract for computer education training with a company like Career Visions for up to a maximum of 104 weeks beginning July 1, 2000, consisting of two sessions for one and half hours per session at a maximum of $75 per hour for training, $30 per hour for travel time and 31 cents per mile for travel to sessions."

Plaintiff's new attorney rejected the offer, noting that the Department required Dawson Springs to provide compensatory education for the same period of time it had been denied.

In response to this apparent deadlock, Dawson Springs once again scheduled an ARC. After one rescheduling, all participants attended an ARC on September 20, 2000. At this meeting the parties agreed that Career Visions would complete the questionnaire previously sent by Dawson Springs. After receiving the questionnaire from Career Visions, Dawson Springs scheduled another ARC for November17, 2000. At that meeting, Dawson Springs agreed to furnish Plaintiff the use of a computer. Nevertheless, it maintained that the duration of the compensatory education should be two years. It is a measure of the complete distrust among the parties that one year after the Department's final order they had yet to complete a satisfactory ARC.

As a next resort, the Longs tried to enlist the Department's assistance in achieving their objectives. On November 30, 2000, Plaintiff's counsel wrote the Department objecting to the delays and to Dawson Springs' ARC proposals. The Department responded stating that its September 2, 1998, decision required Dawson Springs to "convene an ARC meeting with the student as soon as it can be conveniently arranged, to discuss compensatory services for the time period the student was denied FAPE"...and to "submit documentation of this ARC meeting to the Division of Exceptional Children Services." The Department concluded that the "proposal of the ARC satisfies the requirement to develop a corrective action plan and closes this complaint."

It was not the place of its staff members, the Department said, to make decisions about educational services for students. Finally, the letter stated that

> "If the parent in an ARC meeting does not agree with the outcome of an ARC decision, she may request mediation or a due process hearing to resolve the dispute. The procedures that must be followed by the parent to request mediation or a due process hearing are contained in 707 KAR 1:430, Sections 5,6,7 and 8 as well as 34 C.F.R. Part 300.506, 507, 508, 509 and 510. Additionally, the administrative procedures contained in KRS Chapter 13B apply to due process hearings. As you are aware, these procedures have to be exhausted prior to filing any type of civil action."

Plaintiff's counsel disagreed with this interpretation, arguing that the Department itself should implement corrective action. On February 8, 2001, the Department reiterated its previous opinion and stated that it had closed the file. Once again, the Department reminded the Long family that, if it disagreed with the ARC, it could file for a due process hearing.

The parties continued their attempt at mediation. On May 22, 2001, the attended a conference to discuss a potential settlement. At this point, the parties had engaged in over one and a half years of discussions. By now, Dawson Springs had made a unilateral proposal of educational services. The Long family thought that the proposal was insufficient and that the Department should exercise its own power to require a specific compliance with the administrative order. The Department refused to initiate such action. The confluence of these events led to the next stage of the on-going dispute.

C.

On June 28, 2001, Plaintiff filed this complaint in federal court. A week later, Dawson Springs asked Career Visions to begin providing services for Holly pursuant to the ARC corrective action plan approved on November 17, 2000, and using the milestone measurements proposed by Dawson Spring's consultant. Dawson Springs pressed Career Visions to begin providing services. Career

Visions advised Dawson Springs that the Long family had refused to allow the services to begin. The services did not begin.

On September 14, 2001, Defendants moved to dismiss the complaint. After reviewing the status, the Court concluded that animosity between parents and school officials was preventing cooperation that could benefit Holly Long. Therefore, on May 21, 2002, the Court convened a telephonic conference during which the parties eventually agreed to circulate the names and curriculum vitae of three professionals who would evaluate Ms. Long and make reports on a six-month basis. On July 26, 2002, because the parties were making positive efforts to resolve the case, the Court denied all the pending dispositive motions without prejudice to renew them. The Court determined to focus the parties on the remedial services that would most benefit Ms. Long. Dawson Springs was willing to pay for education services which they believed would be beneficial.

After several months the parties agreed that Dr. Deborah Bauder would recommend a program of services and a method for evaluating those services. The process began slowly. When Dr. Bauder attempted to evaluate Holly directly, her counsel objected and stated that their was no need for additional testing. At one point, Plaintiff's counsel told the Court that the only acceptable remedial services were those ordered years ago by the Department of Education Appeals Panel.

On May 9, 2003, the Court convened another conference at which time the parties did agree on a program of services and assessments for a period up to 36 months. From this time forward, Dawson Springs reimbursed those providing agreed upon services. Shortly thereafter, the Court requested and received progress report from Career Visions concerning Holly Long. Upon review, the Court concluded that Holly Long was receiving these services satisfactorily and that the promise of continuing those services could resolve the disputes at issue.

On August 10, 2004, upon recommendation of Career Visions, the Court authorized expansion of Ms. Long's educational services to four hours a day, two days a week. On November 9, 2004, the Court appointed Dr. Robert Glass to monitor and evaluate

Holly Long's education and training. Dr. Glass completed his first evaluation within a month of his appointment.

II.

Plaintiff's primary claim is under the IDEA. 20 U.S.C. Sections 1400-1490. That statute imposes the general requirement that school districts which receive federal funding provide a "free appropriate public education" for all classes of students with special needs. 20 U.S.C. Section 1412; Bd. of Ed. Of Hendrick Hundson Central Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176,179 (1982). Recognizing that each student has different needs, the IDEA establishes a procedural framework in which school administrators, teachers, parents and the student work together to formulate an IEP specifically tailored to the student's needs and abilities. 20 U.S.C. Sections 1401(11), 1414(d); Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359, 368 (1985). The most difficult and distressing problems arise when the parties cannot agree on such a plan. In those circumstances, the IDEA provides administrative procedures to resolve such disputes. 20 U.S.C. Section 1415(b)

The Long family believes that Dawson Springs has systematically thwarted their daughter's access to appropriate remedial education. Plaintiff complains of illegal conduct over a long period of time and alleges claims under at least half a dozen federal statutes. Because the precise legal theories on which Plaintiff's case rest are difficult to pin down, the Court has tried to evaluate the facts of the case in light of any viable claim for relief plausibly raised. The particular choices and the timing of the parties' actions make this a difficult case. The discussion of some legal issues that may not be dispositive in this case is an effort to provide context for consideration of Holly Long's claims.

A.

Plaintiff's real indignation concerns Dawson Springs' delay in providing their daughter's compensatory education between

September 28, 1999, and June 1. 2003, or about three and half years. They believe that she is entitled to compensatory money damages under the IDEA.

The United States Supreme Court long ago determined that the IDEA authorizes reimbursement to parents for their expenditures on special education that a school board was obligated to provide. Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359, 369-370 (1985). While the Court in Burlington did not directly address what other remedies might be available, it did say that the characterization of reimbursement as "damages" was unfounded. Id. At 370-371 ("Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP"). The Sixth Circuit interpreted Burlington as saying that money damages are not available for IDEA violations. Crocker v. Tennessee Secondary school Athletic Association, 980 F.2d 382, 386 (6th Cir. 1992). Plaintiff is highly critical of this decision and essentially asks this Court to ignore it.

Despite its brief and less than compelling analysis, Crocker is consistent with the subsequent prevailing view among the circuits. See Polera v. Board of Education, 288 F.3d 475, 485-6 (2nd Cir. 2002). The First, Second, Fourth, Seventh, Eighth, and Ninth Circuits have also held that damages are unavailable under the IDEA. Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 124 (1st Cir. 2003) (concluding that tort-like money damages are not available under the IDEA); Polera, 288 F.3d at 486 (concluding that a damages remedy is "fundamentally inconsistent" with the goals of the IDEA); Sellers v. School Board of Manassas, Va., 141 F.3d 524, 527 (4th Cir.), cert denied, 525 U.S. 871 (1988)(holding that "[t]ort-like damages are simply inconsistent with IDEA's statutory scheme"); Charlie F. v. Board of Education of Skokie School District, 98 F.3d 989 (7th Cir. 1996)(concluding that "damages are not 'relief that is available under the IDEA"); Witte v. Clark County School District, 197 F.3d 1271, 1275 (9th Cir. 1999)(finding damages unavailable under the IDEA). The Third and Fifth Circuits have addressed the issue without stating a definite "no." W.B. v. Matula, 67 F.3d 484 (3rd Cir. 1995); Salley v. St. Tammany

Parish School Board, 57 F.3d 458 (5th Cir. 1995). Thus, Crocker is sound and binding precedent. Nothing in the development of the case since Crocker diminishes it.

The sixth Circuit's conclusion in Crocker is consistent with this Court's understanding that the IDEA's statutory scheme provides a basis for parties to discuss, agree upon and dispute the educational services that a particular child needs. This Court agrees with the recently expressed view of the First Circuit that "[U]nder the identical remedial language of the EHA, the Supreme Court held that the district court could order reimbursement of private educational expenses because—and the Court was emphatic on this point—such reimbursement did not constitute damages." Nieves-Marquez v. Pueto Rico, 353 F.3d 108, 125 (1st Cir 2003) citing Burlington, 471 U.S. at 370-71.

Perhaps suspecting the unavailability of monetary damages under the IDEA, Plaintiff also asserts a claim of damages under the IDEA, Plaintiff also asserts a claim for damages under 42 U.S.C. Section 1983. Whether a Section 1983 claim may be founded under IDEA violations is an issue that is hotly disputed. See Matula, 67 F3d at 494-95 (3rd Cir. 1995)(holding that Section 1983 actions may enforce IDEA) and Padilla ex rel Padilla v. School Dist. No. 1 in City and County of Denver, Colo. 233 F.3d 1268, 1282-73, FN 5 (10th Cir. 2000) (including a thorough discussion of the circuit-split on the issue and holding that IDEA on its own could not be the basis for a Section 1983 action). Id. At 1273. The Sixth Circuit, however, has at least implied that IDEA rights may be the basis of a Section 1983 suit. Crocker, 980 f.2d at 387 (6th Cir. 1992). The Court will assume for the sake of argument that the implied holding in Crocker is sound and authorizes a Section 1983 action based on the IDEA.

The mere availability of Section 1983 relief, however, does not necessarily guarantee recovery of compensatory damages. By its own terms Section 1983 relief, however, does not necessarily guarantee recovery of compensatory damages. By its own terms Section 1983 creates no substantive rights; it only provides remedy for deprivation of those rights secured elsewhere. 42 U.S.C. Section 1983. The Sixth Circuit has said that a Section 1983

lawsuit may not expand existing statutory rights. Gardenshire v. Schubert, 205 F.3d 303 (6th Cir. 2000); Crocker, 980 f.2d at 387 (6th Cir 1992). Crafting this complaint as a Section 1983 action, therefore, does not expand those rights that the IDEA provides. Id. For all the reason previously stated, this Court agrees with Crocker and is bound to follow it. The IDEAS focuses on ensuring educational services, not awarding damages. Consequently, the Court finds no basis for a federal action for compensatory damages, either directly or though Section 1983, to remedy alleged violations of the IDEA.

Another basis for a Section 1983 action is the denial of procedural due process. U.S. Const. Amend. 14; 42 U.S.C. Section 1983. Plaintiff could argue that both Dawson Springs and the Department have effectively denied or abrogated her due process rights. The Second and Third Circuits have suggested that a plaintiff may pursue money damages for denial of access to administrative remedies made available under IDEA. Polera v. Board of Education of Newburgh Enlarged City School Dist., 288 F.3d at 483 (2nd Cir. 2002); Quackenbush v. Johnson City School District, 716 F2d 141 (2nd Cir. 1983); Muth v. Central Bucks Sch. Dist., 839 F.2d 113, 127 (3rd Cir. 1988); W.B. v. Matula, 67 F.3d 484, 495 (3rd Cir. 1995).

Even should this Court adopt this view as Sixth circuit law, however, the Court would not find such a claim viable here. Plaintiff actually received an administrative hearing and has voiced no objection to it. Plaintiff has an available remedy by either requesting an ARC or filing a due process grievance based on her disagreement with the current education services. Due process does not require that the Department enforce its own remedy. The Department continues to provide perfectly acceptable due process procedures. Plaintiff has made no specific objections to those procedures. On these facts, the Court can find no basis for a Section 1983 due process claim concerning enforcement of the administrative final decision dated September 28, 1999.

C.

As an alternative IDEA remedy, Plaintiff seeks enforcement of the Department's 1999 final administrative order requiring Dawson Springs to provide additional compensatory education. Defendant responds that the statutory framework does not authorize a federal appeal to enforce a CRP ruling. Moreover, Defendant says that any such remedy would require exhaustion of administrative procedures first. To resolve this disagreement requires a close analysis of the statutory and regulatory language and history.

Two distinct administrative procedures are available to enforce rights of special education students under the IDEA. In truth, a lot of confusion surrounds the purpose of legal status of these separate procedures. The first is the so-called due process hearing procedure required by 20 U.S.C. Section 1415(f), further codified in 34 C.F.R. Sections 300.506-300.515 and implemented in Kentucky by 707 KAR 1:340 Sections 2-8 (West 2004). Plaintiff initiated and abandoned her due process remedy on claims against Dawson Springs in 1994. The second is the so-called complaint resolution procedure or CRP authorized in 20 U.S.C. Section 1221e-3, that provided for promulgation of the education Department General Administrative Regulations ("EDGAR"). These regulations, including the CRP, were most recently codified in 34 C.F.R. Sections 300.660-300:662 and implemented in Kentucky by 707 KAR 1:340 Section 15 (West 2004). Plaintiff initiated her own CRP in 1999, from which she now seeks a federal court remedy. Each of these procedures provides an independent means of redressing complaints about IDEA compliance. Irrespective of their related purposes, the two procedures differ in significant ways. Their separate statutory and regulatory origins affect the type of relief available under each.

The most significant difference is that the due process hearing has procedural safeguards that the CRP does not. Those procedural safeguards are detailed in both Section 1415 of the IDEA and in regulations implementing the IDEA, not in the statute itself. The location of the implementing regulations is significant because Section 1415(i)(2)(A) of the IDEA authorizes a civil action for parties "aggrieved by finding and decision made under

subsection (f) or (k) of this section." The term "this section" refers to Section 1415 in which the CRP is not included. Not only does Section 1415(i)(e)(A) authorize a federal appeal; the implementing state regulations make reference to it as well. 707 KAR 1"340 Section 8(2). On the other hand, the Court finds that no statutory language actually authorizes an appeal from the Department's CRP findings. Nor do the federal or state implementing regulations make reference to a federal appeal from a CRP finding. The current state CRP administrative regulations make reference only to an appeal to the Commissioner of Education. 707 KAR 1:430 Section 15(4). A federal appeal from an administrative regulation is simply unavailable without express statutory authorization. Therefore, the Court concludes that an appeal of the CRP final decision is unavailable here.

Labeling this complaint an appeal from the CRP decision probably confuses already difficult issues. The Department's most important conclusions were that Dawson Springs had failed to provide a FAPE and that Plaintiff was entitled to compensatory services for an equal time period. Its order neither specified nor ordered specific compensatory services. It left that job to ARC meetings between the school district and the parents. Tellingly, Plaintiff has never expressed disagreement with part of the Department's final order. Thus, it is not surprising that she never initiated an administrative appeal from any part of the Department's administrative findings or order. (FN 19)

The Longs' real aim may be to challenge the sufficiency of their daughter's current education services. To do so, however, they must exhaust all available IDEA Administrative remedies before pursuing a federal complaint. Gean v. George W. Hattaway, 330 F.3d 758. 776 (6th Cir. 2003); James v. Upper Arlington City School District, 228 F.3d 764, 768-69 (6th Cir. 2000); and also see S.S. v. Eastern Kentucky University, 307 F.Supp.2d 853, 857 (E.D. Ky. 2004). The exhaustion requirement is fundamental to the enforcement of IDEA rights and responsibilities. The reason for this eminently sensible. Federal courts do not possess the expertise to determine the precise nature of an appropriate individual education plan. Stutts v. Eastern Kentucky University, 307

F.Supp.2d 853, 857 (E.D.Ky. 2004)(citing Charlie F. v. Bd. of Educ. of Skokie Sch. Dist., 98 F.3d 989, 992 (7th Cir. 1996). The IDEA leaves the "primary responsibility...for choosing the educational method most suitable to the child's needs...to state and local educational agencies in cooperation with the parents or guardian of the child." Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 207 (1982).

Federal courts are more appropriately able to review an existing administrative record to determine whether that decision was adequately supported or whether it was arbitrarily conceived. Plaintiff has not pursued her due process remedies either with respect to the 1992-1994 or the 1999-2003 time periods. Without an underlying administrative record and the testimony of education experts, a federal court cannot evaluate de novo the appropriateness of the services Dawson Springs is currently providing.

III.

Plaintiff also alleges violations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(d); Title IX of the Educational Amendments of 1972; Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990. The IDEA does not bar an IDEA claimant from bringing claims under other statutes, including those brought here. Indeed, in response to Smith v. Robinson, 468 U.S. 999 (1984), Congress appears to have amended the IDEA to expressly preserve such rights. See Pub. L. No. 99-372, 100 Stat. 796 (1986); S. Rep. No. 99 112 at 2(1985), reprinted in 1986 U.S.C.C.A.N. 1798, 1799. However, that amendment did say that "before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required if the action had been brought under this subchapter." 20 U.S.C. Section 1415(l). Subsection (f) is IDEA's due process hearing provisions. Several questions arise from this seemingly straightforward requirement.

A.

One question is whether the exhaustion requirement applies to all cases that plausibly involve IDEA claims. In Covington v. Knox County School System, 205 F.3d 912, 915-6 (6th Cir. 2000), the Sixth Circuit only went so far as o pronounce that "some courts have interpreted Section 1415 to require the exhaustion of administrative remedies even where the plaintiffs do not exclusively on the IDEA source of their claims." More recently, Judge Hood in the Eastern District of Kentucky considered the Covington case and reached the logical extension of its comments. He concluded that section 1415 "requires the exhaustion of administrative remedies prescribed under the IDEA, even when the plaintiffs do not rely on the IDEA as the source of their claims, if their claim is sufficiently related to 'free and appropriate public education' to a disabled child under the IDEA." Stutts, 307 F.Supp.2d at 857 (internal citations omitted).

This Court is convinced that the plain language of the statute and its that the plain language of the statute and its overall policy together justify such an interpretation. Indeed, a majority of the federal appellate courts have reached the same conclusion as Judge Hood. See Robb v. Bethel School Dist. #403, 308 F.3d 1047 (9th Cir. 2002); Cudjoe v. Independent School District No. 12, 297 f.3d 1058 (10th Cir. 2002); Polera v. Board of Education of Newburgh Enlarged City School District, 288 F.3d 478 (2nd Cir. 2002); Frazier v. Fairhaven School District, 276 F.3d 52 (1st Cir. 2002); Weber v. Cranston School Committee, 212 F.3d 42 (1st Cir. 2000); Babicz v. School Board of Broward County, 135 F.3d 1420 (11th Cir. 1998); and Charlie F. v. Board of Education of Skokie School District, 98 F.3d 989 (7th Cir. 1996). Here, Plaintiff's claims concern almost entirely issues relating to a "free and appropriate education." The factual foundation of these claims is the same as that underlying Plaintiff's IDEA claims based on the acts of Dawson Springs during the same time period.

For all these reasons, the Court concludes that Plaintiff must exhaust her IDEA administrative remedies before bringing claims concerning the same matter under other statutes in this Court.

B.

A second question is whether the CRP hearings satisfy the IDEA's exhaustion requirement, thus paving the way for Plaintiff to pursue these other claims. All but one of the circuits that have addressed this question have found that state CRP procedures are insufficient to satisfy the IDEA's administrative exhaustion requirement. Weber v. Cranston Sch. Comm., 212 F.3d 41, 53 (1st Cir. 2000) (analyzing exhaustion requirements prior to asserting a Section 504 Rehabilitation Act claim); Association for Community Living in Colo. v. Romer, 992 F.2d 1040, 1043-44 (10th Cir. 1993) (analyzing the EDGAR provisions); also see Megal C. v. Independent School Dist. No. 625, 57 F.Supp.2d 776, 789-90 (D.Minn. 1999). (FN 20) Those courts noted that CRP's are different in purpose, scope and procedure from due process hearings. This Court agrees that a CRP is generally "not an adequate alternative to exhausting administrative remedies under the IDEA." Romer, 992 F2d at 1045.

Nothing about our facts, moreover, suggest that a different result is appropriate. The CRP administrative record is woefully short on the type of individualized educational assessment found in a due process hearing record. Plaintiff did not present evidence either that her grievances fall outside the scope of an IDEA due process proceeding or that exhaustion of that remedy would be futile. Plaintiff's primary complaint has both its source and its remedy in educational services offered to Holly Long. Finally, it is illogical that the CRP hearing in these circumstances might also constitute exhaustion of an administrative process because Plaintiff's statutory claims arise from events occurring after the CRP hearing.

For all these reasons, Plaintiff falls short of fulfilling the exhaustion requirement.

IV.

Plaintiff has asserted privacy claims under the Family Education Rights and Privacy Act ("FERPA"), the Freedom of Information Act ("FOIA") and under IDEA regulations. These claims were based upon Dawson springs having either obtained or provided certain of Holly Long's educational records as part of its efforts to determine the appropriate education program for her. As Plaintiff now acknowledges, no private right of action exists for unlawful disclosure under FERPA. Gozanga University v. Doe, 536 U.S. 273 (2002). Similarly, FOIA is not designed to provide a private right of action for unlawful disclosure. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)

Plaintiff claims a federal privacy right under the IDEA through 42 U.S. Section 1983. However, the IDEA does not authorize a separate cause of action under any of its privacy provisions. While the IDEA's implementing regulations do require school districts to seek a parent's consent before transferring files (34 C.F.R. Section 300.571), this claim like others Plaintiff raises here must be raised and evaluated by a impartial due process hearing officer before it can be reviewed by the Court. This claim, that Dawson Springs did not get consent before transferring files has not been raised in any administrative procedure. Any claim of privacy must be made either through a due process hearing or pursuant to IDEA regulations. Plaintiff has made no such claim.

V.

Plaintiff has alleged that the Kentucky Department of Education has failed in its obligations to require school boards in the state to provide compensatory education for her and has failed to enforce its own rulings. This Court has dismissed all claims against the Department..

The Court found neither a factual nor legal basis for the claims against the Department. Both 1994 and 1998, the Department complied with its administrative responsibilities under the due process and CRP regulations. In the former instance, Plaintiff voluntarily dismissed the proceedings. In the latter instance, Plaintiff made no claim against the Department and

expressed no disagreement with its ruling. Plaintiff has no federal appeal from the Department's ruling and this Court has determined that an independent action in federal court is unavailable as well.

The Court agrees with the Department's subsequent legal position that if Plaintiff was dissatisfied with Dawson Springs' educational services, the appropriate remedy was through and ARC meeting or due process hearing.

VI.

This is a distressing case because the Department did find that Dawson Springs failed to comply with its IDEA obligations between 1991 and 1994. After such a serious rebuke, one would have thought that Dawson Springs would be more than eager to provide needed educational services. Sadly, it did not happen. Nevertheless, the delays cannot be laid solely upon Dawson Springs. The Longs chose not to pursue their IDEA rights back in 1994. They chose not to pursue available due process remedies between 1999 and 2003, even after the Department pointed them in the right direction.

The foregoing analysis reveals the proper procedure in these circumstances. The CRP final decision required Dawson Springs to set an ARC to determine the exact nature of Ms. Long's compensatory education. If the Longs could not receive satisfaction through an ARC or if the process was unduly delayed, their options for redress under the IDEA seem clear enough. Recourse to a due process hearing officer pursuant to 707 KAR 1:340 Section 5 is still available to the Longs. Should the Longs be dissatisfied by the due process result, the state regulations establish an appeal to an Exceptional Child's Board panel, and then to federal court. There is little indication that these avenues would be futile and no argument alleging inadequacy of the due process hearing procedure for resolving the Long's primary complaints. The Court concludes that many of Plaintiff's past and present disputes with Dawson Springs concern educational evaluation and the provision of specific educational services required by the IDEA.

The education experts of the due process hearing procedure are in a better position than the Court to evaluate those claims.

As of this writing, both Dawson Springs and the Long family agreed upon a program of services and assessments that for our purposes are deemed to have begun June 1, 2003, and would extend until June 1, 2006. For the past seventeen months Dawson Springs has provided seemingly appropriate services.

For the reasons set forth in this memorandum, the Court concludes that Plaintiff's attempt to recover a monetary award at this time is without legal basis. Plaintiff is without further federal claims at this time.

The Court will enter an order consistent with this Memorandum Opinion.

December 20, 2004

Signed, John G. Heyburn II
Chief Judge, U.S. District Court

cc: Counsel of Record

Footnotes

1 – "Admissions and release committee (ARC)" means a group of individuals ... responsible for developing, reviewing, or revision an individual education program (IEP) for a child with a disability. 707 KAR 1:280

2 – This provision of the CFR allowing appeal to the U.S. Secretary of Education was removed from the Code in 1999.

3 – The Court can find no procedural basis for the Department's reconsideration of its own findings. The current regulations do provide for an appeal to the Commissioner of the Kentucky Department of Education.

4 – This is not surprising. Neither the formal complaint lodged pursuant to 34 U.S.C. Section 300.600-300.662 nor the subsequent investigation concerned Ms. Long's specific future educational

needs. The CRP focused on the allegations in a formal complaint. The complaint in this case detailed failures in the provision of a FAPE but no information concerning the educational assessment or particularized future educational needs of Ms. Long.

5 – Career Visions is an organization dedicated to helping person with special educational and occupational needs. Career Visions was the Long first choice to provide help to Holly.

6 – As required, Dawson Springs provided minutes of al these ARC meeting to the Department.

7 – The parties have disagreed about the length of time required for compensatory education services under the CRP order. The disagreement is somewhat understandable. Holly enrolled in Dawson Springs school district on January 28, 1992, and left on December 7, 1994. This amounts to approximately 136 calendar weeks. School was not in session for the entire 34 months. This translates to approximately 100 weeks of in-school time or six semesters of school. Nevertheless, this does explain why Dawson Springs insisted for some time that it need only provide 104 weeks of compensatory education. Indeed, through November, 1999, the Long family asserted that Holly was entitled to two years of compensatory education for thirty (30) hours per week.

8 – On February 11, 2002, the Department made a similar motion.

9 – See, Court order, April 3, 2003. The difficulty with this position is that the Department did not actually require specific remedial services, but rather ordered Dawson Springs to undertake a corrective action plan to determine specific compensatory services.

10 – This agreement is set forth in the Court's order dated May 20, 2003.

11 – In its June 29, 2004, Memorandum and Order, the Court considered M.s Long's current progress along with the need to appoint a replacement for D. Deborah Bauder.

12 – The Court also said that it would reconsider the dispositive motions previously removed from the docket and asked the parties to file supplemental responses. The parties have done so.

13 – Dr. Glass was not directly critical of the current services, but did believe that Ms. Long could benefit from expanded services. Dr. Glass did not have available Ms. Long's complete file which might include educational and psychological assessments. Nevertheless, he did make certain recommendations concerning Ms. Long's current services and the expansion of them. The Court does not have the background to assess whether additional services are appropriate.

14 – Plaintiff has not requested monetary relief for Dawson Springs' failure to provide a FAPE between 1992 and 1994. The appropriate remedy at the time-the due process proceeding-was dismissed. Even in Plaintiff's later CRP, she did not ask for or receive a monetary award for IDEA violations between 1992 and 1994.

15 – On district court within the circuit has expressed well founded reservations about the result. See Wayne County regional Service Agency v. Pappas, 56 F.Supp. 2d 807, 818-19 (E.D. Mich. 1999). However, even that opinion acknowledges that Crocker "disallows recovery of monetary, non-restitutional, damages under the EIIA (now IDEA)." Id at 820.
16 – This discussion is a somewhat hypothetical because Plaintiff has not precisely made such an argument. Nevertheless, such a claim, if proven, could well be the basis of a claim for compensatory damages.

17 – The initial complaint resolution were promulgated in 1972 as 45 C.F.R. Section 121a.602 under IDEA's predecessor statute, the

Education of the Handicapped Act ("EHA") Loughlin, 686 P. 22d at 390, n. 7; see also, Beth v. Carroll, 87 F.3d 80, 82 (3rd Cir. 1996) The authority for the procedures lay in EHA Section 1412(6), which provided that "[t]he State educational agency shall e responsible for assuring that the requirements of this subchapter are carried out." Id. On April 3, 1980, the complaint procedure requirement of EDGAR was substituted for 45 C.F.R. Section 121a.602 and codified in 1980 at 45 C.F.R. Section 100b.780 and ultimately at 34 C.F.R. Section 76.780-782. Laughlin, 686 P.2d at 390 n. 7. From 1980 until 1993 the authority for EDGAR was found in the General Education Provisions Act at 20 U.S.C. Section 1221e-3(a)(1), and since 1993 authority has been derived from the Elementary and Secondary Education Act of 1965 at 20 U.S.C. Section 2831(a). Beth, 87 F.3d at 82." Megan c. v. Independent School Dist. No. 623, 57 Supp 2d 776, 785 (D.Minn. 1999). Though this Plaintiff was not explicitly argued this point, some plaintiffs argue that because the CRP was transferred from EDGAR to 34 C.F.R. Part 300, a complaint filed under the CRP is therefore filed under Section 1415. The Court finds no basis for this inference in the CRP's legislative history and the Court takes note that the CRP are codified in subpart F, "State Administration: State Complaint Procedures," rather than Subpart E, "Procedural Safeguards: Due Process Procedures for Parents and Children"-the implementing regulations for IDEA Section 1415. Id.

18 – Both the Department and this Court have determined that Dawson Springs has complied with it.

19 – If Plaintiff had a complaint with the actual findings or order, she probably waited too long to say so. The IDEA does not contain a statute of limitations. The Sixth Circuit has not adopted an entirely consistent approach in locating an analogous statute. See Janzen v. Knox County Board of Education, 796 F.2d 484 (6th Cir. 1986); King v. Floyd County Board of Education, 228 F.3d 662 (6th Cir. 2000) In King, the Sixth Circuit held that appeals from administrative proceedings under the IDEA were subject to the Kentucky's thirty-day limitation period. That case concerned the

appeal of the denial of attorney's fees. However, state and federal statutes commonly require expeditious appeal of any administrative ruling. Applying such a limitation here, where Plaintiff is represented by counsel, is not inconsistent with federal law or policy, Id. at 627. Therefore, the statute of limitations probably bars any claim based upon an appeal of the Department's final order.

20 – The Court that found otherwise allowed a CRP to satisfy the exhaustion requirement only in those cases where the individualized evaluation of a disabled student would be immaterial to the facts in a given case. Christopher S. v. Stanislaus County Office of Education, 2004 WL 2260288, #7 (9th Cir. 2004)

21 – in fact, this Court has considered the claims against the Department on several occasions. On October 11, 2001, the Court issued a Memorandum and Order dismissing the Department. On July 1, 2004, the Court essentially reconsidered that ruling and once again found that Plaintiff could not pursue claims against the Department. At that time, the Court also dismissed claims against David Boggs.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:01CV-389-H

HOLLY LONG PLAINTIFF

V.

DAWSON SPRINGS INDEPENDENT
SCHOOL DISTRICT, et al.

ORDER

The remaining Defendant has moved to dismiss all claims in this case. This Court has carefully considered the issues in an accompanying Memorandum Opinion. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that so long as Dawson Springs continues to pay for the current level of education services provided by Career Visions (including transportation), it is in compliance with the Department of Education's final order dated September 28, 1999.

IT IS FURTHER ORDERED that, in the event of any disagreement as to the scope or nature of those services, Holly Long's appropriate remedy is to request a further ARC meeting or to initiate a due process proceeding pursuant to 20 U.S.C. Section 1415(f) and 707 KAR 1:340.

IT IS FURTHER ORDERED that the mpotions to dismiss of all remaining Defendants are SUSTAINED, the IDEAS and Section 1983 claims are DISMISSED WITH PREJUDICE; all remaining causes of action are DISMISSED WITHOUT PREJUDICE.

It is further ordered THAT ON OR BEFORE JANUARY 12, 2005, THE PARTIES SHOULD ADVISE THE Court whether this should be designated a final order.

This is not a final and appealable order.

December 20, 2004

Signed, John G. Heyburn II
Chief Judge, U.S. District Court

cc: Counsel of Record